

(2)
No. 88-291

Supreme Court, U.S.

FILED

OCT 20 1988

JOSEPH E. SPANIOLO, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ANTON GREGORY ZUKAS, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner was arrested when a police officer approached him and asked him a few questions relating to the officer's suspicion that petitioner was transporting narcotics.
2. Whether petitioner's detention was supported by a reasonable suspicion that he was involved in narcotics trafficking.



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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 843 F.2d 179. The order of the district court denying petitioner's motion to suppress (Pet. App. 10-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1988. A petition for rehearing was denied on June 17, 1988. The petition for a writ of certiorari was filed on August 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the denial of his motion to suppress evidence in the United States District Court for the Western District of Texas, petitioner entered a conditional guilty plea to the charge of conspiracy to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 15 years' imprisonment and fined \$10,000. The court of appeals affirmed.

1. The evidence at the suppression hearing showed that at approximately 9:30 p.m. on November 5, 1986, an employee at the Austin, Texas, municipal airport, who had provided reliable and accurate information relating to narcotics smuggling in the past, contacted narcotics agent Robert Nestoroff. The employee reported that a Piper Navajo twin-engine aircraft had just arrived at the airport. The aircraft was equipped with extended-range fuel tanks, and the pilot paid nearly \$400 in cash for 198 gallons of fuel. The only passenger on the plane was extremely nervous and had difficulty holding his cup of coffee without spilling it. The informant described the passenger as a "Miami-Vice type" who wore a great deal of gold jewelry and carried a large amount of cash. The employee overheard the pilot state that the plane had come from Miami with a stop in Tallahassee. After making arrangements to park the plane, the pilot and the passenger took a courtesy car to a local hotel. Pet. App. 10-11; Gov't C.A. Br. 3.

Upon receiving the report from the employee, Agent Nestoroff drove to the airport to view the airplane. In addition to the extended-range fuel tanks, the plane had tinted windows with curtains and Medico high security locks on every keyed opening, all of which are characteristics common to aircraft used in narcotics smuggling.¹ At the

¹ Medico high security locks are favored by smugglers because they make it difficult for police officers to install tracking devices in the locked compartments. Gov't C.A. Br. 7.

hotel, Agent Nestoroff learned that the pilot had registered in the name Anton Gregory Zukas and had given a Miami address. The passenger had registered under the name Troy Climes and had given a California address. A computer check on those names disclosed that Zukas had previously been arrested in connection with the seizure of an aircraft and 1,500 pounds of marijuana. Both men paid cash for their rooms and requested a 5:30 a.m. wake-up call. The passenger made two telephone calls to California from his room. Agent Nestoroff also learned that the airplane had been leased through Sun State Aviation, a business that, although legitimate, provides the type of aircraft preferred by smugglers. Pet. App. 11-13; Gov't C.A. Br. 3-4.

The following morning, Agent Nestoroff and two other officers returned to the airport. Agent Nestoroff saw petitioner place a suitcase inside the plane and begin a pre-flight inspection. After walking back to the hangar, petitioner returned to the plane with the passenger and placed a box in the aircraft. Agent Nestoroff parked his car in front of the aircraft and approached petitioner; one other officer approached the passenger. None of the officers displayed any weapons, and none were in uniform. Pet. App. 13-14; Gov't C.A. Br. 4-5.

Agent Nestoroff asked petitioner if he could examine petitioner's pilot's license and aircraft documentation. Petitioner identified himself as Zukas. Agent Nestoroff advised petitioner that he suspected that the aircraft was being used to transport narcotics. Petitioner stated that he did not know who owned the aircraft. Agent Nestoroff then left petitioner to confer with his fellow officers at the rear of the plane. Those officers told Nestoroff that the passenger had identified himself as John Troy Bruce and had stated that he paid \$1,600 to be flown to California. The officers advised Bruce, who was visibly nervous, that

he was not under arrest. Bruce then consented to a search of his luggage. During this time, petitioner continued to prepare the plane for flight by adding oil to the engine. Agent Nestoroff returned to petitioner, who was working at the front of the plane, and asked him if he would consent to a search of the aircraft. Petitioner laughed and stated, "You are welcome to search the plane and my luggage; I have nothing to hide." The officers initially searched a suitcase identified by Bruce as his. It contained a large number of packages wrapped in colored tape and paper. Bruce stated that the packages were presents for friends. An officer opened one of the packages and found a white powdery substance that he believed was cocaine. At that point, petitioner and Bruce were arrested and issued *Miranda* warnings. Petitioner told the officers that there was another suitcase in a wing compartment. That suitcase was also filled with packages of cocaine. Pet. App. 14-15; Gov't C.A. Br. 4-6.

2. The district court found that the initial confrontation between petitioner and the officers was supported by a reasonable suspicion that petitioner was involved in narcotics trafficking. Pet. App. 18. The court also held that petitioner and Bruce were not arrested until the officers discovered cocaine in the first suitcase. *Ibid.* Finally, the court found that both petitioner and Bruce voluntarily consented to the search of the aircraft and their luggage. *Id.* at 19.

3. The court of appeals affirmed. Pet. App. 1-9. It found that an investigative detention occurred when Agent Nestoroff informed petitioner, without returning his identification and registration papers, that he was suspected of smuggling drugs. *Id.* at 5-6. At the same time, the court held that the following facts, considered together, gave rise to a reasonable suspicion that justified the investigative detention: (1) the small aircraft with its tinted

windows, high security locks, and extended-range fuel tanks was a type favored by smugglers; (2) the aircraft was owned by a company that, although legitimate, frequently leased its planes to smugglers; (3) petitioner and his passenger paid cash for their fuel and hotel rooms; (4) the flight originated in Miami, a source city for drugs, and was headed to California, another drug-trafficking area; (5) the passenger was nervous, wore a great deal of gold jewelry, and carried a large amount of cash; (6) the passenger made calls from the hotel to California; and (7) petitioner had a prior arrest for drug smuggling. *Id.* at 7-8.

The court further held that petitioner was not arrested until the agents found cocaine in the first suitcase. The court explained that, prior to the formal arrest, the officers did not impede or interfere with petitioner's preflight preparations; they did not move petitioner to a different location; their approach was casual; they displayed no weapons; they wore plain clothes; and they advised the passenger that he was not under arrest. Under these circumstances, the court held, the level of intrusion was no more than necessary to dispel the officers' legitimate suspicions. Pet. App. 8-9.

ARGUMENT

1. Petitioner claims that he was arrested without probable cause before he consented to the search of the aircraft and the luggage. In that respect, he also argues that the courts below erred by not considering Agent Nestoroff's subjective intent in determining whether he was arrested. Neither claim has merit.

First, it is well settled that the test for determining whether a Fourth Amendment seizure has occurred is an objective one. That test is whether, "in view of all of the circumstances surrounding the incident, a reasonable per-

son would have believed that he was not free to leave.' " *Michigan v. Chesternut*, No. 86-1824 (June 13, 1988), slip op. 5 (citation omitted). Accord *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.). See also *Maryland v. Macon*, 472 U.S. 463, 470-471 (1985) (adopting objective standard for determining whether a seizure has occurred); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (footnote omitted) ("[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"). An objective standard is also used to determine the level of the intrusion, *i.e.*, whether the seizure is an investigative detention or an arrest. See, *e.g.*, *Berkemer v. McCarty*, 468 U.S. at 442.

Sibron v. New York, 392 U.S. 40, 46-47 (1968), on which petitioner relies, does not state a contrary test. There, the Court merely stated that the search of a suspect's pocket could not be justified as a protective frisk for weapons in part because the officer never stated that he believed that the suspect was armed or otherwise dangerous. Because this Court has repeatedly rejected the argument that an officer's subjective intent is relevant to the question whether an arrest has occurred, further review of this matter is not warranted.²

² Petitioner's reliance (Pet. 10) on several court of appeals decisions is misplaced. In *United States v. Longmire*, 761 F.2d 411, 414-415 (7th Cir. 1985), the court stated that the officer's intent was relevant to the question whether a detention is merely a *Terry* stop or amounts to a full custodial arrest. In so doing, the court relied on *Sibron*, which, as we have shown, does not support that proposition. The court also failed to cite this Court's later decision in *Berkemer v. McCarty*, *supra*, which rejected a subjective standard for determining

In any event, petitioner errs in claiming that Agent Nestoroff believed that petitioner was under arrest before he found the cocaine. To the contrary, according to the findings of the district court (Pet. App. 16), Agent Nestoroff testified that "either suspect could have revoked the consent to search and left the airport up until the white powdery substance was discovered in the blue-grey suitcase." Even if, as the court of appeals noted (*id.* at 8), Agent Nestoroff would have been "reluctant" to permit the plane to leave, his reluctance at most manifests an intent to detain petitioner. It does not show that Agent

whether an arrest has occurred. The court's error in that one instance, however, has not affected the Seventh Circuit's analysis of the question whether particular conduct constitutes an arrest. In several subsequent cases, the Seventh Circuit has made clear that it adheres to the objective test for determining whether a suspect has been arrested. See *United States v. Espinosa-Alvarez*, 839 F.2d 1201, 1205 (1987); *United States v. Pavelski*, 789 F.2d 485, 488 (1986); *United States v. Dyer*, 784 F.2d 812, 815 (1986); *United States v. Borys*, 766 F.2d 304, 308-309 (1985), cert. denied, 474 U.S. 1082 (1986). The Eleventh Circuit's decisions in *United States v. Magdaniel-Mora*, 746 F.2d 715, 723 (1984), and *United States v. Lueck*, 678 F.2d 895 (1982), involved the related question whether a suspect was "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966). Those decisions have been overruled by the subsequent decision of the Eleventh Circuit in *United States v. Phillips*, 812 F.2d 1355, 1359-1360 (1987), which adopted the objective test recognized by this Court. Likewise, the Fifth Circuit recently overruled that court's earlier decisions on which petitioner relies (Pet. 9-10 n.3). *United States v. Bengivenga*, 845 F.2d 593, 596-597 (1988) (en banc), petition for cert. pending, No. 88-170. To the extent that any court of appeals has stated to the contrary, those decisions have not survived the Court's decision in *Berkemer* or the Court's decision last Term in *Michigan v. Chesternut*, *supra*. Accordingly, in view of the considerable precedent from this Court adopting an objective standard, further guidance on this issue is unnecessary.

Nestoroff believed that his encounter with petitioner had evolved into an arrest prior to the discovery of the cocaine.

The objective facts also show that petitioner's detention was no more intrusive than a *Terry* stop until he was formally arrested. For example, the officers did not tell petitioner that he was under arrest; they displayed no weapons or handcuffs; they used no force against petitioner; and their conversation with him was casual. Petitioner continued to prepare the aircraft for departure while the officers spoke to him and his passenger. The encounter took place outside in a public area. And the officers specifically told Bruce that he was not under arrest.

Petitioner essentially relies on only two facts to support his claim that he was arrested: Agent Nestoroff parked his car in front of the aircraft, and he continued to hold petitioner's license and registration papers during their conversation. But neither fact is suggestive of an arrest in the circumstances of this case. Petitioner was not yet ready to take off and therefore neither action by Agent Nestoroff impeded petitioner in any way. See *United States v. Bengivenga*, 845 F.2d 593, 600 (5th Cir. 1988) (en banc), petition for cert. pending, No. 88-170. Compare *Florida v. Royer*, 460 U.S. at 503-504 & n.9 (the retention of Royer's ticket and luggage prevented him from taking his flight). At most, those two facts elevated what otherwise would have been a consensual encounter into a brief investigative detention.³ They do not, however, elevate the level of

³ Petitioner argues (Pet. 13) that he did not believe that he was free to leave. The district court, however, did not credit petitioner's testimony. Pet. App. 16-17. Moreover, petitioner's subjective intent is irrelevant for the same reasons that the officer's subjective intent is irrelevant. *Berkemer v. McCarty*, 468 U.S. at 442 & n.35. In any event, any suspect who is subjected to a *Terry* stop is "seized" within the meaning of the Fourth Amendment and is not free to leave until the

the encounter to that of an arrest. Petitioner suggests no conflict among the circuits on this question, and his fact-bound claim therefore does not warrant further review.

2. Both courts below correctly found that petitioner's detention at the airport was supported by a reasonable suspicion. The officers knew the following facts when they first asked to see petitioner's license and documentation: (1) the small aircraft, with its extended-range fuel tanks, tinted windows, and high security locks, was the type favored by drug smugglers; (2) the plane was leased from a company which, although legitimate, frequently leased aircraft to smugglers; (3) petitioner had a prior arrest for transporting drugs by plane; (4) his passenger was extremely nervous; (5) petitioner and his passenger used cash to pay for the fuel and their hotel rooms; (6) petitioner was traveling from a source city for narcotics (Miami) to an area of high consumption (California); and (7) the passenger was dressed in "Miami Vice" garb, including a great deal of gold jewelry, and he carried a large amount of cash. Pet. App. 7. By the time the agents sought petitioner's consent to search the plane, they also knew that the passenger had registered at the hotel under a false name; the passenger had paid \$1,600 for the private two-day flight, which was both more expensive and less convenient than a commercial cross-country flight; and petitioner had claimed that he did not know who owned the airplane that he was piloting. Whether the detention occurred at the time of the initial approach or, as the court

officer has had an opportunity to dispel or verify his suspicion. Accordingly, the fact that petitioner may not have been free to leave only indicates that he was subject to an investigatory detention for which reasonable suspicion was required. It does not indicate that he was arrested.

of appeals found, when the officers sought petitioner's consent to a search, the reasonable suspicion standard was met. An experienced narcotics officer viewing the whole picture (see *United States v. Cortez*, 449 U.S. 411, 417 (1981)) could reasonably infer from those facts that petitioner and his passenger were transporting narcotics from Miami to California.

Although we believe that the court of appeals' ruling was correct, this Court may nonetheless wish to hold this case pending its decision in *United States v. Sokolow*, cert. granted, No. 87-1295 (June 6, 1988). In that case, the Ninth Circuit held that the facts known to the agents were not sufficient to stop a passenger in a commercial airport on the suspicion that he was involved in narcotics trafficking. In its decision, the Ninth Circuit criticized the government's reliance on the so-called drug courier profile as a means of identifying narcotics traffickers, an argument that petitioner also presses here. Some of the facts in this case are similar to those in *Sokolow*,⁴ but there are also differences. For example, the agents in this case knew that petitioner had a prior record of narcotics trafficking. That type of particularized information was not just another profile characteristic, as petitioner suggests. The officers also knew that petitioner was using a type of plane that is favored by drug smugglers. Because the private plane was more expensive and slower than commercial flights, the agents could reasonably have inferred that the two travelers were using a private plane in order to avoid air-

⁴ For example, in both cases the suspects carried a great deal of cash and used cash to pay their traveling expenses. In both cases, the suspects traveled from Miami, the nation's principal source city for cocaine. Also, both *Sokolow* and petitioner's passenger were nervous and wore a great deal of gold jewelry.

port surveillance, to which commercial flights are subject. And there was an obvious discrepancy between the name that the passenger used at the hotel (Climes) and the name that he gave the officers at the airport (Bruce). That fact appears to be the type of direct proof of narcotics smuggling that the Ninth Circuit found critical to the reasonable suspicion determination in *Sokolow*. Accordingly, the judgment in this case should survive regardless of the outcome in *Sokolow*. Nevertheless, because the Court's decision in *Sokolow* could potentially affect the disposition of this case, we do not oppose holding the petition pending the decision in *Sokolow*.

CONCLUSION

As to the third question presented in the petition, the petition for a writ of certiorari should be held pending the Court's decision in *United States v. Sokolow*, cert. granted, No. 87-1295 (June 6, 1988), and then disposed of as appropriate in light of that decision. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1988